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BEFORE THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the State Water Resources
Control Board Hearing to Determine Whether to
Adopt a Draft Cease & Desist Order Against
California American Water Regarding its
Diversion of Water from the Carmel River Under
Order WR 95-10

SIERRA CLUB'S CLOSING REPLY BRIEF

I.
**CRSA and Sierra Club Are Not Estopped Through Res
Judicata or Collateral Estoppel from Joining in the
Prosecution Team's Request To Issue the Proposed CDO**

California American's argument that CRSA and Sierra Club are estopped by res judicata and collateral from seeking a Cease and Desist Order against Cal-Am that involves additional limits on Cal-Am's diversions from the Carmel River is based on an erroneous characterization of their 1996 Petition filed in Sierra Club, et al. v. SWRCB. Neither the Sierra Club or CRSA is challenging the factual or legal conclusions of Order 95-10. Sierra Club, CRSA, and NMFS are asking only that the Board issue the proposed CDO in light of the enforcement authority the Board clearly reserved in Order 95-10 and 2002-02 and to exercise that reserved authority in light of new facts, changed conditions, and the designation of the SCCC steelhead as a federally listed threatened species since Orders 95-10 was issued. ¹

¹ There are four NMFS rule-makings since 1995 involving the SCCC steelhead that this Board must take into account:

- a. the designation of the SCCC steelhead ESU as a threatened species under the ESA in 1997. 62 FR 43937 (8/18/97)
- b. the designation of critical habitat (the Carmel River) for the SCCC steelhead in 2005 (70 FR 52488 (9/2/2005)).

1 Order 2002-02 reserves authority to the Chief of the Water Rights Division “to modify the flow
2 requirements of the order...as necessary to prevent this order from being in violation of the
3 Endangered Species Act, or unreasonably interfering with efforts to comply with the Endangered
4 Species Act.” Id. at 11. (emphasis added) In connection with its proposal to issue a CDO pursuant to
5 its authority under Water Code §1052, the Water Rights Division is exercising its reserved authority to
6 prevent its Orders (95-10, 98-04, 2002-02) from authorizing continuing violations of Section 9 of the
7 ESA by Cal-Am or interfering with efforts to comply with the ESA. 16 U.S.C. §1538.

8 Res judicata and collateral estoppel can give rise to estoppel only as to those matters pled and
9 adjudicated by the Superior Court in Sierra Club, CRSA v. SWRCB. California-American implies
10 that Sierra Club’s, and CRSA’s petition for writ of mandate in the above action challenged 95-10 in its
11 entirety and raised issues identical to those raised in the complaints filed with the Board that caused
12 the Board to have a hearing in 1995. This is a total mischaracterization of their petition.

13 In their Second Amended Petition for Writ of Mandate, filed March 28, 1996 (Cal-Am Exhibit
14 16), Sierra Club and CRSA alleged in the First Cause of Action that with respect to Condition 6 of the
15 Order (requiring a feasibility study of supplying water to Carmel Valley Village Filter Plant from
16 wells downstream of the Plant), the Board failed to require “full investigation as to whether Cal-Am
17 can supply water to its customers in a manner that will maximize beneficial uses, through keeping as
18 much water as possible in the River, as for downstream as possible for fishery and riparian uses.” In
19 the Second Cause of Action, the petitioners alleged the Board abused its discretion in approving
20 Condition 4 of the Order, which allowed Cal-Am to use yield from its seaside aquifer to service new
21 development. In the Third Cause of Action, petitioners alleged the Board committed an abuse of
22 discretion when it made the 20% conservation measure a “goal” rather than a requirement (Condition
23 3). (Petitioners’ Fourth, Fifth, and Sixth Causes of Action related solely to Decision 1632).

24 Under California law, res judicata will bar a subsequent suit on the same ground of recovery
25 when the parties are identical, the prior judgment was rendered by a court of competent jurisdiction on
26 the merits, and both suits are based on the same cause of action. Adolph Coors Co. v. Sickler, 608
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c. the promulgation of a §4(d) rule defining exceptions to the ‘takings’ prohibitions of the Act
(California American’s “takings” through diversions are not excepted.) 65 FR 42422 (7/10/2000)
d. the designation of the SCCC steelhead DPS. 71 FR 834 (1/5/2006)

1 F.Supp. 1417, 1429 (C.D. Cal. 1985). Res judicata gives rise to estoppel against Sierra Club and
2 CRSA only if the relief sought here is on the same ground of recovery, and both are based on the same
3 cause of action. The doctrine of collateral estoppel "precludes a party to an action from relitigating in
4 a second proceeding matters litigated and determined in a prior proceeding." (*People v. Sims* (1982) 32
5 Cal.3d 468, 477.)

7 Settlement discussions ultimately resulted in the Superior Court filing an Order on June 5,
8 1998, which incorporated and modified a Stipulation of the Parties that had been signed in February-
9 March 1998. Cal-Am Exhibit 17. The Court's order, filed June 5, 1998, provided (paragraph 4) that
10 WR 95-10 shall be "modified by the SWRCB by the following amendments to Conditions 4, 5, 6 and
11 13 only; all other provisions of Order 95-10 are to remain in full force and effect..." (emphasis added).
12 Paragraph 8 of the Order reads:
13

14 "The Superior Court retains jurisdiction pursuant to CCP §664.6 to enforce the terms
15 of this stipulation, and to review compliance by Cal-Am with the conditions of Order
16 95-10 that are the subject of this stipulation and judgment..." *Id.* (emphasis added).

17 Res Judicata and collateral estoppel would apply only to relitigating Sierra Club's and CRSA's
18 claims that Conditions 4,5,6 and/or 13 violated applicable law. Those claims have nothing to do with
19 the relief Sierra Club and CRSA seek in this proceeding, namely abating Cal-Am's unlawful
20 diversions as a trespass under Water Code §1052.

21 II.

22 Cal-Am's Diversions Are Without A Legal Basis of Right

23 California-American continues to argue that Order 95-10 'authorized' it to continue its
24 diversions. In 2002-02, the Board determined:

25 "To now recommend that the SWRCB 'make legal all water diverted below river
26 mile one as motivation for Cal-Am to divert water from that location' is inappropriate
27 and contrary to law. The diversion is still without a legal basis of right. Moving
28 unlawful diversions to a different location on the Carmel River does not create a legal
basis of right. The SWRCB has no authority to grant a legal basis of right when the facts
clearly show that the diversion of water is without a legal basis." Order 2002-02 at 16
(emphasis added).

1 **III.**

2 **The Board Did Not Adopt a “Physical Solution” In Order 95-10**

3 Citing Hutchins, The California Law of Water Rights, Cal-Am argues that the Board imposed a
4 physical solution that can not now be altered by the Board through issuance of a cease and desist
5 order. Hutchins, however, notes that “the finding and application of physical solutions in the
6 settlement of water controversies...have engaged the attention of the courts in a number of cases. “
7 Hutchins at 351. “Physical solutions” are court-created. The cases cited by Hutchins lend no support
8 to the notion that the Board, absent legislative authority, can impose physical solutions.

9 Water Code, Division 2 (§§1000-5976), gives no authority to the Board to “authorize” or
10 legalize diversions for which no appropriation permit exists through the imposition of physical
11 solutions. Water Code §2100 confers limited authority on the Board to file actions in the Superior
12 Court to impose physical solutions to protect the quality of ground-water. No section in the Water
13 Code confers authority on the Board to order a temporary physical solution that would “authorize”
14 otherwise illegal diversions that require an appropriation permit. As the Supreme Court has made
15 clear in City of Barstow v. Mojave Water Agency, 23 Cal.4th 1224 (2000), there are constitutional
16 constraints on the superior courts in imposing a physical solution. The Court stated:

17 “In ordering a physical solution, a court may neither change priorities among water
18 rights holders nor eliminate vested rights in applying the solution without first considering
19 them in relation to the reasonable use doctrine.”

20 23 Cal.4th at 1250

21 Under the state’s exclusive administrative scheme for recognizing water rights, the Board
22 cannot through a physical solution, license a water use which is not vested or permitted, or ignore
23 priority or vested rights of other water users on the Carmel River. City of Barstow, id. Certainly, the
24 Legislature has purported nowhere in the Water Code to confer such authority on the Board. Had the
25 Legislature intended the Board to enable “trespassers” to continue diversions in the context of
26 “temporary physical solutions” at the expense of continuing damage to public trust resources (in
27 violation of the ESA) and in derogation of the rights of other users of Carmel River water, it would
28 have delegated such authority to the Board in Division 2 of the Water Code. It did not do so.

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1 IV.

2 **The Board Has Recognized that Order 95-10 Is Not a Static Document and**
3 **That Its Remedial Measures Relating to Harm Caused by Cal-American’s**
4 **Unlawful Diversions May Be Modified Over Time Through Exercise of its**
5 **Authority Under Water Code §1052, In Order To Ensure Compliance With**
6 **the Endangered Species Act.**

7 **A. Changes Made in 95-10 to Address Impacts to Steelhead from Cal-Am’s Diversions**

8 Order 95-10 has been amended by the Board through Orders 98-04, 2001-04, and 2002-02.
9 The amendments were to promote greater protection for the SCCC steelhead (designated as threatened
10 under the ESA in 1997, see 62 FR 43937) and other trust resources that Order 95-10 had found had
11 been adversely affected by Cal-Am’s illegal diversions. Order 98-04 replaced Condition 5 of 95-10
12 with a more explicit requirement to increase the flow of water in the River toward the Lagoon, and
13 ordered that

14 “To the maximum extent feasible without inducing sea water intrusion or unreasonably
15 affecting the operation of other wells, Cal-Am shall satisfy the water demands of its customers
16 by extracting water from its most downstream wells.”²

17 Order 2001-04 ordered Cal-Am to satisfy the water demands of its customers by extracting
18 water from its most downstream wells between river miles 9.0 and 17.2 to the maximum practicable
19 extent for the benefit of the maintenance of steelhead habitat in the lower Carmel River.

20 Order 2002-02 rescinded Order 2001-04 and ordered Cal-Am to cease withdrawal of water
21 from San Clemente Dam during low flow periods except during an emergency. Cal-Am was also
22 ordered to reduce diversions during low flow periods from certain downstream wells. Cal-Am was
23 also ordered to install a pump to deliver water from the Begonia Zone to the Carmel Valley Village
24 Zone. Implementation schedules were established. In its hearing on reconsideration of Order 2001-
25 04, the Board heard testimony from NMFS, DFG, and other parties concerning remediating the effects
26 of Cal-Am’s diversions on steelhead in light of the designation of the SCCC steelhead ESU as
27 threatened.

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² Additionally Cal-Am was ordered to conduct a study of the feasibility, benefits, and costs of supplying water to areas then served by the Carmel Valley filter plant from nearby wells downstream of the plant, and to also study the feasibility of using the Begonia Treatment Plant in lieu of the Filter Plant.

1 **B. Since Order 95-10 Was Issued, The South Central California Coast Steelhead**
2 **ESU-DPS Has Been Designated As Threatened Under The ESA, The Carmel**
3 **River Has Been Designated As Critical Habitat for the Steelhead, And Take**
4 **Guidance Applicable To The SCCC Steelhead ESU And DPS Has Been Issued**
5 **By NMFS.**

6 The South-Central Coast Steelhead (ESU) was listed as threatened in 1997. 62 FR 43937
7 (August 18, 1997); 50 CFR § 227.4(k). In its rule designating the South Central Coast steelhead ESU
8 as “threatened”,³ NMFS found that the ESU “is likely to become endangered in the near future.” *Id.* at
9 43953. NMFS also issued Take Guidance.⁴ The “take” guidance stated:

10 “Activities that NMFS believes could potentially harm, injure, or kill steelhead in the
11 endangered listed ESUs and result in a violation of section 9 include, but are not limited
12 to,...Destruction or alteration of steelhead habitat in the listed ESU’s, such as diverting,
13 blocking, or altering stream channels. (62 FR at 43952, August 18, 1997).”

14 On September 21, 2005 NMFS designated the Carmel River as critical habitat for the SCCC
15 steelhead. *See* FR 52488. The Service explained:

16 Section 3 of the ESA defines critical habitat as “specific areas within the geographical
17 area occupied by the species at the time of listing, on which are found those physical or
18 biological features that are essential to conservation of the species...”

19 50 CFR, 424.12(b) requires NMFS to consider essential habitat features in designating critical habitat.
20 These include:

21 “space for individual and population growth and for normal behavior; food, water, air,
22 light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for
23 breeding, reproduction and rearing of offspring...”

24 See 50 CFR 226.211(c).

25 On January 5,2006, NMFS designated SCCC steelhead as a Distinct Population Segment. 71
26 FR 834. In connection with this rule-making the NMFS found:

27 “The BRT [Biological Review Team] found high risks to the abundance, productivity,
28 and diversity of the DPS...Informed by this assessment, the strong majority opinion of the
29 BRT was that the SCCC steelhead DPS is likely to become endangered within the foreseeable
30 future... We conclude that protective efforts collectively do not provide empirical evidence of

31 ³ This determination is a necessary predicate to designation of a species as “threatened.” A “threatened
32 species” is defined as any species likely to become an endangered species within the foreseeable
33 future...” 16 USC §1532(20).

34 ⁴ “Take” guidance is issued pursuant to a policy of NMFS and FWS committing to identify, to the
35 maximum extent practicable at the time a species is listed, those activities that would or would not
36 constitute a violation of Section 9 of the ESA. 59 FR 34272 (July 1, 1994).

1 sufficient certainty of implementation and effectiveness to substantially ameliorate the level of
2 assessed extinction risk for all but one of the DPS's under consideration. 71 FR 852-853.

3 The Service determined that the SCCC steelhead DPS is "likely to become endangered within the
4 foreseeable future throughout all or a significant portion of [its] range." 71 FR 857. The Service also
5 issued additional Take Guidance pertaining to the SCCC steelhead DPS:

6 "Activities that we believe could potentially "harm" steelhead (see 50 CFR 222.102) in
the listed DPS's and result in a violation of the section 9 take prohibition include...

7 2. Destruction/alteration of the steelhead habitats for any listed DPS, such
8 as...draining, ditching, diverting, blocking, or altering stream channel, or surface, or
groundwater flow." 71 FR 858

9 In United States v. Glenn-Colusa Irrigation District, 785 F.Supp 1126 (E.D. Cal. 1992), the
10 United States brought an action to enjoin a irrigation district from diversions through pumping that
11 killed salmon in violation of Section 9 of the ESA: The Court concluded that the District was
12 unlawfully "taking" salmon through its pumps and "that neither state nor federal law exempts or
13 excuses the District from complying with the Act." 785 F.Supp. at 1135. The District Court issued a
14 permanent injunction, and declined to engage in a "detailed analysis of the mechanisms and a
15 consideration of the social utility of ordering" the District to cease taking winter-run salmon through
16 its pumps. Id at 1132.

17 As reflected in NMFS's consistent takings guidance since 1997, and consistent with the
18 Court's holding in US v. Glenn Colusa Irrigation District, supra, California-American is engaged in
19 unlawful takings of steelhead in violation of Section 9 of the ESA. The Board has a duty to abate Cal-
20 Am's unlawful takings, as Cal-Am has no exemption from the ESA prohibition on "taking" in the
21 form of an incidental take permit.⁵ If, under the CDO, abatement of the unlawful diversions is
22 appropriately tailored to the life history of the steelhead, Cal-Am's unlawful takings will be
23 proportionately reduced.

24 Since Order 2002-02 was issued, the SCCC steelhead DPS shows a declining trend. See
25 MPWMD, KU2, (Chart showing decline since 2003). The best measurement available of population
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⁵California-American would be exempted from the take prohibition only if it had an incidental take permit from NMFS. It does not have an incidental take permit. An incidental take permit will issue only if it is "incidental to an otherwise lawful activity." 50 CFR 17.22 (d) (2) (i).

1 trends in the SCCC steelhead DPS are the numbers of spawning adults returning to the area below San
2 Clemente Dam. See MPWMD, KU1, Paragraph 9.⁶

3 The current Carmel River steelhead population is significantly diminished relative to the
4 already reduced population levels found in the River as late as 1969 (1336 at San Clemente Ladder)
5 See Dettman and Kelley PT. Exhibit 42, p. 19. Thus the minor population gains seen from 1997-2002,
6 (see MPWMD, KU3) are offset by the declining trend from 2003-2008 and provide no basis for Board
7 inaction with respect to curtailing diversions. The continuing diversions each water year deprive the
8 Carmel River steelhead of habitat needed for recovery. Each year's diversions make a bad situation
9 worse, and are precluding recovery of the species, as well as maintenance of the already diminished
10 population. The diversions cause reductions in otherwise available critical habitat that is needed to
11 improve the affected population's likelihood of surviving and recovering in the wild. Ambrosius
12 Testimony, PT 39, at 3-6.⁷

13 In Palila v. Hawaii Dept. of Land and Natural Resources 649 F.Supp 1070, (D. Haw. 1986) the
14 Court held:

15 "A finding of "harm" [as a component of "take"] does not require death to
16 individual members of the species; nor does it require a finding that habitat degradation is
17 presently driving the species further toward extinction. Habitat destruction that prevents
18 the recovery of the species by affecting essential behavioral patterns causes actual injury
19 to the species and effects a taking under Section 9 of the ESA." 649 F.Supp at 1075-76
(emphasis added).

20 See also Forest Conservation Council v. Rosboro Lumber, 50 F.3d 781 (9th Cir.1995) (holding
21 that habitat modification that is reasonably certain to injure an endangered species by impairing its
22 essential behavior patterns constituted actual harm and warranted injunctive relief).

23
24 ⁶ MPWMD witness fisheries biologist Kevin Urquhart recommended an alternative CDO
25 based on population of returning steelhead below San Clemente Dam. He recommended:

26 "If steelhead declined below 300-400 fish for one year, it could be the trigger
27 to implement the first 1693 AF curtailment of diversion and if the number was low for
28 two years in a row, that could be a trigger to increase curtailment of existing
diversions to the 2257 AF level." MPWMD, KU1 at 5.

⁷ NMFS has observed that:

"It is important to assess productivity, since negative trends in productivity over sustained
periods may lead to genetic and demographic impacts associated with small population sizes.... In
general, viable population trends should be positive unless the population is already at or above
viable abundance levels." 64 FR 73479, 73483 (December 30, 1999).

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V.

If Cal-Am’s Claims That the First Levels of Diversion Reductions Will Have No Beneficial Habitat Effects For the SCCC Steelhead DPS Are Supportable, It Would Be Appropriate For the Board to Order the Immediate Implementation of 20%-35% Curtailments of Diversions.

Cal-Am claims, as does MPWMD (through Kevin Urquhart’s testimony) that the first level of diversion reduction will not produce tangible habitat benefits sufficient to ameliorate continuing harm to the Carmel River steelhead as a result of Cal-Am’s diversions. Sierra Club urges that if Board so finds, that it modify the proposed CDO so as to implement the 20%-35% curtailment percentages immediately in lieu of the first phase reductions (15%).⁸

VI.

Conclusion

Sierra Club urges the Board to adopt the CDO as proposed to be modified by Sierra Club expert hydrologist-fisheries biologist, Dr. John Williams, which would include a provision for augmented flows to the Carmel River Lagoon. If the Board is persuaded that the first two levels of cut-backs will not produce significant habitat gains, Sierra Club urges the Board to order that Cal-Am’s diversions be curtailed at the proposed order’s third and fourth levels (35% and 50%).

Respectfully submitted,



Laurens H. Silver
Counsel for Sierra Club

⁸ Fisheries Biologist Kevin Urquhart concluded that the “third and fourth level of cutbacks proposed in the draft CDO reduce CAW diversions from the lower river by 35% and 50% from current levels of diversion. These larger cutbacks are likely to benefit steelhead production in the lower river, but precise degree of improvement is uncertain.” (MPWMD, KU1 at 5). (Emphasis added.) Mr. Urquhart also prepared charts showing that in Critically Dry Water years, flows may be sustained to the lagoon for a month to a month and a half longer by the four levels of diversion cutbacks proposed in the CDO. *Id.* at 9. Mr. Urquhart’s charts also show that in a Normal Water Year type flows may be extended to as much as 40.5% of the 6.2 miles of dry waterbed (under the 35%-50% reductions). *Id.* at 10. Mr. Urquhart concludes that “significant benefits” to the steelhead are likely to occur under the “last two levels of restrictions proposed in the Draft CDO.” *Id.* Mr. Urquhart states that “if the final CDO could keep any significant amount of additional stream habitat [in the 2.3 mile stretch below the Narrows] wet throughout the summer and fall, it would likely result in additional fall production of juvenile steelhead for the watershed as a whole.” *Id.* at 11.

1
2 **PROOF OF SERVICE**

3 I declare as follows:

4 I am over 18 years of age and not a party to the within action; my business address is P.O. Box
5 667, Mill Valley, CA, I am employed in Marin County, California.

6 On November 10, 2008, I served a copy of the foregoing following document entitled
7 **SIERRA CLUB CLOSING REPLY BRIEF and REQUEST FOR NOTICE OF OFFICIAL**
8 **ACTIONS OF NATIONAL MARINE FISHERIES SERVICE RELATED TO THE SCCC**
9 **STEELHEAD ESU AND DPS**

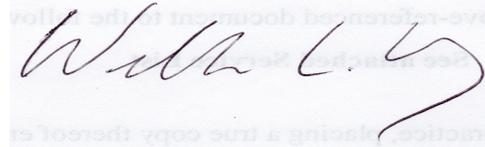
10 Following interested parties in the above-referenced document to the following:

11 **See attached Service List**

12 BY ELECTRONIC MAIL

13 I caused a true and correct scanned image (PDF file) copy to be transmitted via the electronic mail
14 transfer system to the email address(es) indicated in the attached Service List of Participants.

15 I certify under penalty of perjury under the laws of the State of California that the foregoing is
16 true and correct and that this declaration was executed on November 10 , 2008, at Penn Valley,
17 California.

18
19
20 

21 _____
22 Willow L. Wray
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